Supreme Court of the United States.

JAMES K. BROWN, Plaintiff in Error, and THE STATE OF NEW JERSEY, Defendant in Error.	October Term, 1899. No. 290. On Writ of Error to Hudson County, N. J., Court of Oyer and Terminer.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

The writ of error in this cause brings before this Court for review, the conviction of plaintiff in error in the Court of Oyer and Terminer of Hudson County, N. J., of the murder, on July 26, 1898, of Charles Gebhardt, a police officer of the City of Hoboken, in said county. Brown was tried before Mr. Justice Lippincott and Judge Blair, and a struck jury, the trial beginning October 3, 1898, and plaintiff in error was convicted of murder in the first degree on October 5, 1898, and on October 14, sentenced to be hung on December 8, 1898.

By writ of error the case was taken to the New Jersey Court of Errors and Appeals, and the judgment of the Court of Oyer and Terminer was affirmed March 6, 1899; Brown was again sentenced to be hung on April 18, 1899. The opinions of the Court of Errors and Appeals are filed with the record in this cause (see printed copies of same). The majority opinion was by Mr. Justice Depue, and the judgment of the Court of Oyer and Terminer was sustained by eight of the judges of said court. A dissenting opinion was filed

by Mr. Justice Dixon and assented to by two other judges of the Appellate Court. On the main question as to the constitutionality of a struck jury, there was no division; and on the question of the denial of peremptory challenges the dissenting opinion expressly says same was not considered as involved in the case, as the defendant was allowed all the peremptory challenges he asked in the trial of the cause. The dissenting opinion was based upon alleged errors in the charge of the court on the question of self-defence.

On April 5th 1899, the case was brought to the United States Supreme Court from the Hudson County Court of Oyer and Terminer by writ of error, allowed to act as a supersedeas by Mr. Justice Shiras. The writ of error has been returned with the record and the cause docketed in this court as Number 290 of the October Term, 1899. A motion to advance the cause on the calendar of this court was made by defendant in error on the opening of the present October Term and granted; and the cause set for hearing on October 30, 1899.

The real question presented by the writ of error for the decision of this court is, were the statutes of New Jersey under which the traverse jury in the Hudson County Court of Oyer and Terminer was impanelled, in conflict with the provisions of the constitution of the United States, the fourteenth amendment thereto, or any public statute of the United States, and therefore void.

The statutes in question provided for what in New Jersey is called a "struck jury", and are as follows:

SECTION 75. "The Supreme Court, Court of Oyer and Terminer and Court of Quarter Sessions, respectively, or any judge thereof, may on motion in behalf of the State, or defendant in any indictment, order a jury to be struck for the trial thereof, and upon making said order the jury shall be struck, served and

returned in the same manner as in case of struck juries ordered in the trial of civil causes, except as herein otherwise provided."

"An Act relating to Courts having criminal jurisdiction and regulating proceedings in criminal cases (Revision of 1898)," approved June 14, 1898; P. L. (N. J.) 1898 page 894.

Section 76 of the same act (supra) "When a rule for a struck jury shall be entered in any criminal case the Court granting such rule may, on motion of the prosecutor, or of the defendant, or on its own motion, select from the persons qualified to serve as jurors in and for the county in which any indictment was found, whether the names of such persons appear on the Sheriff's book of persons qualified to serve as jurors in and for such county or not, ninety-six names, with their places of abode, from which the prosecutor and the defendant shall each strike twenty-four names in the usual way and the remaining forty-eight names shall be placed by the Sheriff in the box in the presence of the Court, and from the names so placed in the box, the jury shall be drawn in the usual way."

The manner of striking, serving and returning a struck jury ordered in civil causes, and referred to in section 75, (supra,) as the manner to be pursued where a jury is ordered to be struck in a criminal case is provided in an act entitled "A Further Supplement to an act entitled 'An Act concerning juries' (Revision) approved March twenty-seventh, one thousand eight hundred and seventy-four," and approved May 8, 1894, P. L. 1894, Chapter 146, page 211. This section amended the twenty-fourth section of "An Act Concerning Juries" found in Revision of N. J., approved March 27, 1874, page 528; and the above supplement may also be found in General Statutes of New Jersey, page 1856, section 62, and is as follows:—

"That when an order shall be made for a struck jury, the sheriff of the proper county, or other officer

who ought to impanel the jury in such a case, shall deliver at a certain day and place, to the judge of the court before whom the jury is to be struck, a book containing the names of the several persons in his county qualified to serve as jurors, with their places of abode; and the party applying for such struck jury, or his attorney, shall give six days previous notice to the adverse party or his attorney, and to the judge, sheriff or other officer aforesaid, of the time and place of striking the said jury; at which time and place the judge shall, in the presence of the parties or their agents or attorneys, or such of them as shall attend for that purpose, select and transcribe from the said book the names of forty-eight such persons, with their places of abode, as he shall think most impartial and indifferent between the parties, and best qualified as to talents, knowledge, integrity, firmness and independence of sentiment to try the said cause; and thereupon the party applying for such jury, his agent or attorney shall first strike one of the said names and then the adverse party, his agent attorney or shall strike out another, and so on, alternately, until each have stricken out twelve; but if the adverse party shall not attend such striking nor any person in his behalf, then the said judge shall strike for him; and when each shall have stricken out twelve as aforesaid, the remaining twenty-four shall be the jury to be returned to try the case; or the said judge may in his discretion permit either party to make a copy of said list so selected by him and postpone the actual striking of said jury, until a future day to be fixed by him, not less than five nor more than ten days from the day of selecting the said list, at which time the said parties or their agents, or such of them as may attend for that purpose, shall proceed to strike the said jury in the manner herein above directed, or as directed in the twenty-fifth section of this act, as the case may require; and then the said judge shall thereupon make a fair copy of the names of the remaining

twenty-four persons, with their places of abode, and certify the same under his hand to be the list of jurors struck as aforesaid for the trial of the said cause; which list shall be delivered to the sheriff or other officer who ought to summon such jury, together with the venire facias, by the person applying for such struck jury, his agent or attorney, at least ten days previous to the time appointed for the trial of such cause, and such sheriff or other officer shall thereupon annex the same list to the said venire facias and return the same as the panel of the jury to try the said cause, and summon them according to the command of the said writ; and in case of neglect or refusal to deliver the list and venire aforesaid, the cause shall be tried by a common jury of the county, unless the Court shall for some good cause determine otherwise."

The Twenty-fifth section of the act referred to in the foregoing section 62, provides for thirty-six jurors names to be on the list from which the striking is to be done, in place of forty-eight, but in the trial of civil causes only.

General Statutes N. J., Section 25, page 1849.

It will be observed that in criminal cases the list of jurors from which the striking is done contains ninety-six names, and each side strikes twenty-four, leaving forty-eight from which the trial jury is formed.

Section 76, (supra).

ARGUMENT.

I

What clause of the constitution of the United States, or of any amendment thereto, or of any statute of the United States was violated by the foregoing statutes of New Jersey, under which the jury was impanelled in this case in the trial court.

The only assertion in the trial court of a federal question was that the statute, under which the jury was impanelled was "*unconstitutional and void.*" (Printed record, page 11 .)

The only statement of a federal question in the New Jersey appellate court was that "the trial court erred in refusing to sustain the challenge to the array of the jury *because the act under which the jury was drawn is in violation of the constitution of the United States and the State of New Jersey.*" (Printed record, page 6 .)

General statements of alleged errors in the trial court or of violation of the Constitution, or any of the amendments, or federal statutes are not sufficient to raise a federal question.

> ***Cuday's Case, 131 U. S., 280, 286.***
> ***Whitten v. Tomlinson, 160 U. S., 231, 242.***
> ***Kohl v. Lehlbach, 160 U. S., 293, 296.***
> ***Clarke v. McDade 165 U. S., 168, 172.***

Neither the trial court nor the state appellate court decided any question as to the validity of the New Jersey statutes being repugnant to the Constitution or Statutes of the United States.

> ***Murdock v. Memphis, 20 Wall, 590, 635.***
> ***Eustis v. Belles, 150 U. S. 366.***
> ***Bacon v. Texas, 163 U. S., 207, 216.***
> ***Harrison v. Morton, 171 U. S., 38, 46.***

There is nothing in the Constitution of the United States, or any amendment thereto, excepting possibly

the fourteenth amendment, affecting the questions sought to be raised in this case. No specific violation of any provision of the federal constitution can be sustained. No privilege or immunity of plaintiff in error, attaching to him as a citizen of the federal government under the constitution, was violated nor under any of the amendments to the federal constitution which it may be alleged were violated.

The 14th Amend't to the U. S. Constitution. Guthrie, p. 58.

The privileges and immunities arising out of the nature and essential character of the national government and granted or secured by the constitution of the United States are those protected by the Fourteenth Amendment to the Federal Constitution.

Slaughter Houses Cases, 16 Wall, 36, 74.
U. S. v. Cruikshank, 92 U. S., 542, 549.
In re Kemmler, 136 U. S., 436, 448.

1. That part of the fourteenth amendment which it may be alleged is applicable to this case is as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(a.) WHAT PRIVILEGE OR IMMUNITY OF PLAINTIFF IN ERROR AS A CITIZEN OF THE UNITED STATES WAS INFRINGED OR ABRIDGED. He was given a trial by an impartial jury of twelve men in the State and county where the crime was committed. Under the federal constitution this means only—what is commonly understood as a jury—twelve men—unanimity in the verdict—impartiality—drawn from the county or place of crime.

Hayes v Missouri, 120 U. S., 71.
Thompson v. Utah, 170 U. S., 343, 349.

(*b.*) HE WAS NOT DEPRIVED OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW. He was tried by due process of law under laws of the State of New Jersey, and by what is generally understood as *due process of law.*

Pennoyer v. Neff, 95 U. S., 714, 733.
Hurtado v. California, 110 U. S, 516, 535.
Caldwell v. Texas, 136 U. S., 692, 697.

(*c.*) HE WAS NOT DENIED THE EQUAL PROTECTION OF THE LAWS WITHIN THE JURISDICTION OF NEW JERSEY. He was tried under laws applicable to all her citizens or those violating her laws—as the words EQUAL PROTECTION OF THE LAWS are understood in the Fourteenth Amendment.

Missouri v. Lewis, 101 U. S. 22, 31.
Hayes v. Missouri, 120 U. S. 68.
Caldwell v. Texas (supra).
In re Converse, 137 U. S. 631.

2. In line with the fourteenth amendment Section 709 of the "Revised Statutes," U. S. (1873-1874) page 133, title "Supreme Court Jurisdiction," Chapter XI, was passed, regulating the procedure whereby cases were to be brought from the State Courts to this court for review, where the validity of a state statute was drawn in question as repugnant to the Constitution and Laws of the United States, and the decision was in favor of the validity of the state statute. This Section 709 is as follows:

"A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the

constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. * * *"

The Fourteenth Amendment was not designed to interfere with the power of the states to protect the lives, liberties, and properties of its citizens and to promote their health, peace, morals, education and good order, nor to restrict the legitimate sphere of the legislative power of the state.

In re Kemmler (*supra*).

3. The decisions of the Courts of New Jersey even if a federal question was involved will not be reversed if there is another independent ground of the decision by the state court upon which its judgment can rest.

Murdock v. Memphis (*supra*) *635.*
Egan v. Hart, 165 U. S. 11.
Bacon v. Texas, (*supra*).

The same questions relative to the validity of the struck jury laws of New Jersey were raised and argued by the same counsel as appear in this case at the last term of this Court, in the case of Clifford v. Heller reported without opinion, in 172 U. S. 641. This case of Clifford v. Heller is again pending in this Court on a second appeal from an order of the United States Circuit Court Judge for the District of New Jersey denying a writ of habeas corpus, and the validity of the

struck jury laws of New Jersey is again raised in the Clifford case. It is of great importance that this Court decide the questions raised in this cause, as such decision will control this and other cases depending on such decision, and to prevent delay in the administration of the criminal laws of New Jersey.

II.

The jury as impanelled and sworn in the cause was a legal jury, as known to the courts of this country, and as derived through the common law, and the Constitution and Statutes of New Jersey.

FIRST:—WHAT IS A LEGAL JURY AS GENERALLY KNOWN AND UNDERSTOOD FROM THE DECISIONS OF THE COURTS OF THIS COUNTRY?

This Court has stated what is ordinarily understood by a legal jury in the case of *Thompson v. State of Utah, 170 U. S. 343.* Also reported in *Book 42, Lawyers Co-operative Edition, page 1061,* where are collected valuable notes on Jury and Jury Trials.

The jury at common law was required to be composed of twelve good and lawful men of the county where the crime was committed.

4 Black. Com. 350, 351
2 Hale's P. C. 161.
1 Chitty's C L. 505.
1 Thompson on Trials, p. 4, sec. 3.

By this was meant that they must be men sufficient; first, as to their property, secondly, as to their character and, thirdly, as to their age, quality, and the exemptions to which they may have been entitled.

1 Chitty C. L. p. 502.

For any want of these requirements the juror could be challenge by the accused, that is, he was challenged for cause.

4 Black. Comm. 353.

These jurymen were summoned at common law and returned by the sheriff on a writ of venire facias, but before the commissions of Oyer and Terminer and General Jail Delivery the sherriff's authority was a general precept and not a venire facias. As to the number of jurors returned, the statute of 3 Geo. 2, enacted that there must be a return of not less than forty-eight, nor more than seventy-two, but prior to that it was customary to return twenty-four jurors, but a larger or smaller number could be returned, and if twelve were sworn at the trial, the proceedings were valid.

1 Chitty Crim. Law, 505, 506.

There must be twelve men, but as to their qualifications there is no longer any property qualification in most of the States of the Union, and it has not been held that this is such a departure from the common law jury as to make such change unconstitutional.

5 Crim. Law Mag. p. 774 and cases

The origin, history and essentials of a valid jury are so thoroughly and learnedly discussed in the opinion of Mr. Justice Depue, who spoke for the majority of the New Jersey Court of Errors and Appeals, in this case in that Court, that nothing can be said in this brief that could aid the Court on the subject. This opinion is a well of knowledge from one of New Jersey's most learned jurists, one whose thirty-three years of experience as one of the judges of her highest court, give his opinions the sanction of learning fortified by the demonstration of actual practice and experience.

(*See the opinion returned with the printed record in the cause, and also printed in pamphlet form and a copy of which accompanies this brief.*)

SECOND:— THE JURY WHICH TRIED BROWN WAS A VALID JURY AS DERIVED THROUGH THE COMMON LAW AND THE CONSTITUTION AND STATUTES OF NEW JERSEY.

Struck juries existed at the common law, and were a constitutional form of jury trial adopted into the practice of the State of New Jersey.

In *Moschell vs. State, 24 Vroom (53 N. J. L.) 505,* (June Term 1891 N. J. Supreme Court) Justice Magie (now Chief Justice) delivering the opinion, after speaking of the division of juries said: "But courts have for a long period of time upon extraordinary reasons made orders for a special jury in a particular case. Bacon's Abr. tit. 'Juries.'

This ancient practice is now regulated by our jury act. Jurors thus ordered are not selected by the Sheriff, but by the court or a judge. They are summoned, not for general service during a stated term, but for a special service in a single case."

This case was affirmed by the Court of Errors and Appeals at March Term, 1892. *25 Vroom (54 N. J. L.) 390.*

In the case of *Fowler v. State, 29 Vroom (58 N. J. L.) 423,* argued at November Term, 1895—of the New Jersey Supreme Court, before Chief Justice Beasley and Justices Magie and Ludlow, by the same attorney as now appears for the plaintiff in error, the contention was made "that the jury that had been struck was unconstitutional in as much as the fundamental law which declares that the right of trial by jury shall remain inviolate." (Constitution of New Jersey, Article 1, Section 7) "calls for an ordinary jury and not for a special one."

The learned Chief Justice, than whom there was no greater scholar learned in the common law—answered the contention as follows: "The obvious answer to

this objection is that the trial by struck jury was part of the system of legal procedure derived by the people of this State from the English law, and that it was confined and regulated by legislation in this commonwealth as early as the year 1797, (Pat. L.) which was forty-seven years before the constitution of 1844 was established."

"The constitutional mandate referred to, therefore did nothing more than to ratify and perpetuate the right of trial by jury *as in substance*, it then existed."

Article 1, Section 7, Constitution of New Jersey (adopted 1844, reads: "The right of trial by jury shall remain inviolate, but the legislature may authorize the trial of civil suits when the matter in dispute does not exceed fifty dollars, by a jury of six men". Same article, section 8, reads: "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel in his defence."

The judgment of the Supreme Court in the case of Fowler v. State (supra) was at the November Term 1896 of the New Jersey Court of Errors and Appeals affirmed by a unanimous vote. *30 Vroom (59 N. J. L.) 585.*

In what respect under the law of New Jersey did the method of trial by struck jury infringe upon the constitutional provisions respecting a trial by jury. Wherein did the jury that tried Brown differ from a jury drawn by a Sheriff from the general panel. The number forty-eight from which the trial jury was drawn, and left from the list of ninety-six after each party had struck twenty-four, was the same as would have been the special panel or list of the jury and from which special panel or list would have been taken the jury of twelve. *Chapter 237, Section 82 P L. (N. J.) page 897.*

The jurors were drawn from the same county as an

ordinary Sheriff's jury. The number of the trial jury was secured to the defendant, namely, twelve good and lawful men. They were all duly qualified. Instead of being selected by the Sheriff from the general panel they were selected in open court in presence of the defendant and his counsel from among the several persons in the county qualified to serve as jurors, and from the list so selected the panel of twelve was formed. There was an application and order in open court for the jury granted on motion of the State of which the defendant had previous notice. Defendant as well as the state could have applied for a struck jury. The venire to summon the jury issued to the Sheriff and was returned by him. The defendant had the right and did reject and strike twenty-four names, and had in addition his five peremptory challenges; thus in effect having twenty-nine peremptory challenges, as well as his common law challenges to the array or to the polls. In this case he was allowed all the peremptory challenges he claimed, and as the dissenting opinion of the N. J. Court of Error and Appeals expressly states, the plaintiff in error was not entitled to a reversal on this ground. In the method of selection by the Court instead of by the Sheriff alone appears the only difference. The method of forming the jury actually secured to the defendant a better jury than is usually obtained from the general panel. The list of jurors was selected by the court from the Sheriff's list of those liable to jury duty, and under the provisions of the struck jury law the selection was of men "*most impartial and indifferent between the parties and best qualified as to talents, knowledge, integrity, firmness and independence of sentiment to try the cause.*" The defendant had this list twenty days before the trial.

The New Jersey constitutional requirements "that the right of a trial by jury shall remain inviolate" and "that in all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury," was in no way violated as the impartial-

ity of the jury was secured to the defendant and a better jury obtained than under the system of drawing a trial jury from the general panel as petit juries are usually formed.

Bouvier's Law Dictionary, Vol. 2, p. 538, Title "Special Jury," defines a special jury as "one selected in a particular way by the parties. A panel is made out and each party is entitled to strike from it the names of a certain number of jurors, as provided for by the local statutes, and from those who remain, the jury in that case must be selected. This is also called a struck jury." The same author at page 684, Vol. 1, under the title "jury" defines same as "a body of men selected according to law for the purpose of deciding some controversy" and under the same title, sub-division 6, says "it is scarcely practicable to give the rules established in the different states to secure impartial juries; it may, however, be stated that in all the selections of persons who are to serve on the jury is made by disinterested officers, and that out of the list thus made out the persons are selected by lot."

As stated by the Court in *Fowler v. State* (*supra*) as early as 1797 New Jersey passed an act providing for struck juries.

This act did not extend to an indictment for an offense where the party was entitled to peremptory challenges. R. L., (N. J.) p. 313.

This statute was incorporated in the act concerning "Juries and Verdicts" in the Revision of 1845—of New Jersey—Rev. Statutes, p. 968, and with a law passed in 1851 relating to struck juries, P. L., (N. J.) 1851, p. 92; was carried into the Revision of 1874 and may be found in the act concerning "Juries," Revision 1874 (N. J.) p. 527, Section 12, and is as follows:

"The Supreme Court, the Circuit Courts, the Courts of Common Pleas, Court of Oyer and Terminer and General Jail Delivery, and the Courts of General Quarter Sessions of the Peace, respectively, may on motion in behalf of the State, or of any prosecutor or defendant in any indictment or information in the

nature of a *quo warranto*, or on motion in behalf of the State; or of any plaintiff or defendant, in any action triable by a jury, order a jury to be struck for the trial thereof, provided that no order for a struck jury shall be made in any civil action unless the Court or Judge to whom the application is made shall be satisfied by affidavit, that the nature and importance of the matter or matters in controversy in such suit or action render it reasonable and proper that said order be made."

By this revision the power to order a struck jury was conferred upon the courts named on the trial of any indictment, and without any exception or proviso, as to cases where a party was entitled to peremptory challenges as in the act of 1797—and this is substantially the same provision of law now in force as *Section 75 (supra) of the Revision of 1898.*

The decision of the New Jersey Court of Errors and Appeals construing the statutes in question, and that same do not violate the Constitution of New Jersey, will be conclusive on this Court and even though this Court may differ from the State Court.

***Murdock v. Memphis** (supra) p. 611.*
Louisiana v. Pilsbury, 105 U. S. 278.
McElvaine v. Brush, 142 U. S. 155.
Hallinger v. Davis, 146 U. S. 319.
Forsyth v. Hammond, 166 U. S., 506.
14th Amendment, Guthrie, p. 44.

THIRD:—IT MAY BE URGED IN THIS COURT (1) THAT BECAUSE THE CRIME WITH WHICH DEFENDANT BELOW WAS CHARGED (MURDER) WAS A FELONY AT COMMON LAW, A STRUCK JURY COULD NOT BE HAD AT COMMON LAW IN CASES OF FELONY, AND HENCE THAT THE STATUTES OF NEW JERSEY RELATING TO STRUCK JURIES IN CAPITAL CASES WERE UNCONSTITUTIONAL

AND (2) THAT HAVING BEEN TRIED BY A STRUCK JURY DEFENDANT WAS DEPRIVED OF HIS COMMON LAW RIGHT OF TWENTY PEREMPTORY CHALLENGES.

(1) As to the first of these contentions much ancient learning may be brought forward to show that a struck or special jury could not be had at common law in cases of felony.

In New Jersey the division of crimes into felonies and misdemeanors, as same existed at the common law with all the incidents in felony of forfeiture, death for almost every offence, and other characteristics never existed.

"The word felony in the general acceptation of English common law comprised every species of crime which occasioned at common law the forfeiture of lands or goods."

4 Black. Comm. 95.

In New Jersey where all offences are statutory, felony has no distinct, well defined meaning applicable to our system of criminal jurisprudence, and such as in this case is sought to be read into the constitution as affecting the provision for a jury trial.

As said by His Honor, Mr. Justic Depue, in the case of *Jackson v. State—February Term, 1887, 20 Vr. (49 N. J. L.) 255.* "The criminal code of this State wholly ignores the distinction between felonies and misdemeanors. Statutory offences if designated at all, are called in the "Crimes Act" either misdemeanors or high misdemeanors. *Rev. p. 226.*" Considering the eminence of the jurists (Mercer Beasley, David A. Depue, Cortlandt Parker) who made the revision of 1874, and this decision on the designation of crimes, force is added to the argument that in New Jersey the term felony as used at common law, and therein including nearly every crime in the calendar, has no controlling effect—either in the constitutional provi-

sion relating to a jury trial, or any legislation on the subject of jury trial.

In Ohio where all offences are statutory, as in New Jersey, the Court say, "The term felony has no distinct and well defined meaning applicable to our system of criminal jurisprudence. In England it has a well known and extensive signification, and comprises every species of crime which at common law, worked a forfeiture of goods and lands. But under our criminal code the word FELONIOUS though occasionally used expressed a signification no less vague and indefinite than the word CRIMINAL."

Matthews v. State, 4 Ohio N. S. 542.

This construction of the word "felony" is shown by one of the early New Jersey acts relating to "crimes," Elmer's Digest (N. J.) 1838. The word felony is not found as a designation of any crime in this act. The same statement is true in relation to the same act in the Revision of 1877, N. J., and also in the last Revision of the "crimes" act, P. L. (N. J) 1898, chapter 235. With this understanding of the word felony, as shown by its use in the criminal jurisprudence of New Jersey, the construction contended for by plaintiff in error is not to be maintained in the face of all the legislation and the foregoing decisions relating to struck juries in this State.

Under the common law larceny was a felony punishable with death (*4 Black. Comm. 237*). By the New Jersey statute it has always been a misdemeanor. As it was a felony at common law, plaintiff in error might contend that a person charged with larceny should not be tried before a struck jury, because under the common law no struck jury trials could be had in cases of felony. But being a misdemeanor under our law, it may be tried by a struck jury, if circumstances warrant. Has this made the juries in trials for crimes now changed to misdemeanors, any less impartial than in trials of the same crimes, as felonies at common law?

The Legislature has without question exercised the power to change the character of crimes, which before were felonies at common law and punishable with death forfeiture of lands and goods and all the penalties of attainder, reducing them to misdemeanors and softening the punishment. The Legislature has, in cases of former felony, taken away the attainders and forfeiture of lands and goods. In murder even, this has been done, and the crime has been divided into degrees, and the death penalty, though generally retained in the crime of murder, has been abolished in some States and in others changed in form, and the defendant been permitted to plead guilty and the Court, in place of a jury, empowered to fix the degree of the crime, and defendant has been permitted to entirely waive his constitutional right to a trial by jury.

Hallinger v. Davis (supra).
State v. Almy, 61 N. H. 428; 22 L. R. A. 744.

Even in crimes, felonies at common law and yet unchanged in character by statute, the Legislature can control the procedure for enforcing the law in the matter of impanelling the jury and regulating of challenges and providing for the punishment. To hold otherwise would be to prevent the States from legislating at all as to the grade of offences and their method of trial and punishment.

A strong effort was made in the Court of Errors and Appeals of New Jersey by the present counsel for plaintiff in error, to do away with the effect of the decision in *Fowler v. State* (*supra*) on the ground that Fowler was not indicted for a felony. He was indicted for conspiring to pervert the due administration of the election laws, a crime which while designated as conspiracy in the statute had a much deeper and extended meaning, than the old meaning of conspiracy at common law. In its effect the crime for which Fowler was indicted touched the very foundation of government and was as though treason had been committed against the State. Coming as did

the decision from Chief Justice Beasley, as the voice of the Court, it should have the effect of *stare decisis* in this case—on the question of struck juries at common law.

In February Term, 1827, the Supreme Court of New Jersey in the case of the *State vs. Lucien Murat, 4 Halstead (9 N. J. Law) 3*, charged with rape, (a felony at the common law, *4 Black Comm. 211*) granted a rule for a struck jury to try an indictment pending in the Oyer and Terminer in Burlington County.

Wall *for the defendant* said: "He was extremely anxious to have the indictment tried at the next Oyer and Terminer and to have the benefit of a special jury, and asked if the Court could grant a rule for a special jury to try a cause in the Oyer and Terminer. He had understood that there had been such a practice."

Chief Justice: "There are divers instances in which this Court has ordered special juries for the Oyer and Terminer."

R. Stockton, as *amicus curiae*, said "he recollected many instances in which it had been done but that he had always entertained doubts as to the propriety of it."

Chief Justice: "It has been the practice of this Court, therefore you may take a rule for a special jury."

The rules of the Supreme Court of New Jersey provided for struck juries.

1 Coxe (1 N. J. L.) Rule V., (1805.)
Elmer's Digest (N. J., 1838.) p. 694.

The designation of crimes into felonies and misdemeanors not having prevailed in New Jersey, the reason for the ancient practice at the common law in not allowing struck juries in cases of felony has ceased to exist.

The common law, as adopted by the Constitution of New Jersey, was itself subject to change.

"The common law and statute laws now in force,

not repugnant to this constitution, shall remain in force *until they expire by their own limitation, or be altered or repealed by the legislature* * * * ."

Constitution of New Jersey, 1844, Article 10, Schedule 1, General Statutes N. J., p. XXXVI.

A ~~somewhat~~ similar provision is to be found in the first Constitution of New Jersey, adopted July 2, 1776, and in Constitution of New Jersey, as amended September 7, 1875. *In all of these constitutions the common law was expressly subject to change by the legislature; and to now hold that everything connected with the ancient common law jury must remain as it was, and that the same is not subject in any way to change, would be incongruous and directly contrary to the provisions of the Constitution of New Jersey.*

All the State laws and decisions relating to the impanelling of the jury under such a holding would thereby be annulled and reversed, and the thousands of convictions heretofore had under State laws regulating the impanelling of the jury, held to have been void.

Under the common law the qualifications and method of impanelling the jury were changed from time to time by parliament—showing that the formation of the jury was subject to regulation and a matter of procedure. The States have generally legislated upon the subject.

The institution itself has barely preserved its own identity. It cannot be possible that the constitution intended to attach itself to the statute laws then in force and make them unchangeable. It aims rather to place the right beyond the power of the legislature to abridge, and at the same time to leave it in the power of the legislature to improve it from time to time to meet the ever changing phases of human affairs.

State v. Worden, 46 Conn. 365.

2. *As to plaintiff in error's contention, that by a struck jury he was deprived of his peremptory challenges.*

At common law he was originally entitled to thirty-five peremptory challenges, one less than three full juries.

4 Black. Comm. 354.

Subsequently by statute, 22 Henry VIII. c. 14, this was reduced to twenty.

4 Black. Comm. 354.

The legislation on this subject and the number of peremptory challenges allowed in capital cases in the different states has always been subject to the legislative will as is shown by the differences in the number allowed in the different states. The whole subject has always been within the legislative power and the number of peremptory challenges to be used either by the prosecution or the defendant may be restrained, limited or withheld altogether.

Rapalje Crim. Pr., Sec 185.
Archbold Criminal Prac. & Pl., (7th Ed. Waterman,) Vol. 1, p. 560.
American & English Enc. of Law, (1st Ed.) Vol. 12, p. 346.
American & English Enc. of Pl. & Prac., Vol. 12, p. 478.

In Walter v. People, 32 N. Y., p. 159 (1865), it was held: "It is provided by statute that on any trial for any offence punishable by death or by imprisonment in the State prison for the term of ten years, or for a longer term, the people shall be entitled peremptorily to challenge five of the persons drawn as jurors for such trial and no more. This is claimed to be an unconstitutional enactment, but with what provision of the constitution it conflicts is not apparent. The constitution of 1846, it is true, preserves the trial by jury, in all cases in which it had been theretofore

used, but this certainly is no limitation of, or restriction upon legislative power except as to the right guaranteed, viz., a jury trial in all cases in which it had been used before the adoption of the instrument. I am not aware of any other constitutional question that may be supposed to have the remotest bearing upon the question. Trial by jury cannot be dispensed with in criminal cases, but it is obviously within the scope of legislation to regulate such trial * * * * *. The subject of peremptory challenge has always been under legislative control. * * * * * * * Even though the right to peremptory challenges be given by common law, it could be restrained, limited or withheld altogether by the legislative will."

The number of peremptory challenges is a matter of legislative discretion, and may vary according to the constitution of different communities, and the difficulties in each of securing intelligent and impartial jurors.

Stokes v. People, 53 N. Y. 164, 173.
Hayes v. Missouri, (supra) 70.
Com. v. Dorsey, 103 Mass. 412, 419.

In Moschell v. State, (supra) Justice Magie announcing the opinion for the Court, said at page 504: "The provision for peremptory challenges in case of struck juries in criminal trials was first adopted by a supplement to the "Act relative to juries and verdicts," which was approved April 6, 1871, Pamphlet L., p. 111. It provides that in such cases the same peremptory challenges should be allowed as in other cases. When brought into the Revision this clause was so altered as to limit peremptory challenges in all cases to three in number and thereby the legislative intent was clearly manifested that the number of such challenges should not depend on the provisions of other laws."

If the contention of plaintiff in error is to prevail the legislature has no power over the number of peremptory challenges allowed at common law in

cases of felony. Yet from the time of the first constitution it has been continually exercised.

Under the common law the State had no right of peremptory challenge.

Archbold Cr. Pl. & Pr. (7th Ed. Waterman) p. 544.
4. Black. Comm. p. 353.

By Section VI, of "An act regulating proceedings in trials in criminal cases," passed the sixth day of March, 1795, Elmer's Digest N. J. (1838) p. 121, sec. 8, it is provided "Every person who shall be indicted for treason, murder, or other crime punishable with death, or for mis-prision of treason, manslaughter, sodomy, rape, arson, burglary, robbery or forgery, and shall voluntarily and duly plead the plea of not guilty to such indictment shall be admitted peremptorily to challenge twenty of the jury and no more," etc.

The next section 7, of the act last recited and being section nine Elmer's digest (*supra*), provides that, "Neither the attorney general nor any person prosecuting for and in behalf of this State, shall be admitted in any case to challenge any jury without assigning a cause certain to be tried and approved by the court; AND FURTHER the privilege of peremptory challenge shall not be allowed to offenders in any cases but such as are specified in the section immediately preceding" (*Supra*).

The section of the law first quoted provided for twenty peremptory challenges in the classes of crime mentioned—and the section secondly mentioned provided that no other persons than those provided in the preceding section, should be entitled to any peremptory challenges, and yet this law would be unconstitutional according to plaintiff in error's contention, because it deprives persons charged with crimes—as larceny, for instance, and which at common law was felony—of their peremptory challenges.

By subsequent legislation the State was allowed

three peremptory challenges and where defendant was not entitled to twenty peremptory challenges, this was increased subsequently to six, Gen. Stat.,(N.J.) p. 1856, sec. 63. In cases where defendant was allowed twenty peremptory challenges the State was allowed ten peremptory challenges, Rev. of 1877, (N. J.) p. 531, sec. 35, P. L. 1852, p. 32, and the defendant in any indictment in cases where twenty peremptory challenges were not allowed was given three peremptory challenges—Rev. 1877, p. 530, sec. 34, P. L. 1869, p. 619. This number was subsequently increased to ten, Gen. Stat. (N. J.) 1855, sec. 60, P. L. 1891, p. 24.

On the trial of every indictment before a struck jury three peremptory challenges were allowed. *Rev. 1877, (N. J.) p. 531, P. L. 1871, p. 111.*

In the "Criminal procedure" act, Revision of 1877, p. 280, sec. 71, a similar provision is found to section 8, p. 121, in Elmer's Digest, before quoted, and giving to defendant in the crimes mentioned twenty peremptory challenges, except that perjury or subordination of perjury are added to the crimes wherein twenty peremptory challenges were allowed, and the proviso at the end of this section 71 in the Revision of 1877 is as follows:

"PROVIDED, THAT NOTHING IN THIS ACT RESPECTING CHALLENGES SHALL APPLY TO CASES OF STRUCK JURIES." This same section is found in General Statutes of New Jersey, p. 1134, sec. 71, and in the Revision of 1898, P. L. 1898, p. 896, sec. 80, with the same proviso therein.

By the revision of 1898 (P. L. 1898,) p. 896, sec. 81, where twenty peremptory challenges are not allowed, the State is entitled to ten and the defendant to twelve peremptory challenges, AND IN THE TRIAL OF ANY INDICTMENT WHERE A STRUCK JURY IS ALLOWED, THE STATE AND DEFENDANT EACH IS ENTITLED TO FIVE PEREMPTORY CHALLENGES.

This legislation shows that the matter of per-

emptory challenges has been from the time of New Jersey's first constitution a matter of legislative control, and the decision in Moschell v. State (*supra*) supports and maintains such legislation, and hence the second ground of plaintiff's insistment that at common law he was entitled to twenty peremptory challenges is shown to be under legislative control. The reason asserted why at common law in cases of felony, struck juries were not allowed is, that the accused would thereby lose his peremptory challenges. The legislature controls the matter of peremptory challenges, and the felonies which at common law could not, as alleged, be tried before struck juries must be subject also to the legislative control so far as the method of jury trial is concerned, without affecting a defendant's constitutional rights. *Cessante ratione legis, cessat ipsa lex.*

III.

The legislature has a right to regulate the process whereby the jury is impanelled. There is nothing in the constitution to prohibit this so long as the right of trial by jury in substance is preserved. It is a matter of procedure and one for state regulation.

Is a special or struck jury in capital cases a jury less fair and less impartial than the ordinary jury of the common law? The Constitution of the United States has enacted that no State shall pass any ex post facto law, and in construing this clause it has been held that though the law which makes an act done before the passage of the law, and which was innocent when done, criminal, is ex post facto; and every law which aggravates a crime and makes it greater than it was when committed, or increases the punishment therefor is ex post facto; still the procedure for bringing the offender to justice may be varied from

time to time and applies as well to past offences as to future.

"But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. *Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose.* The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. A law giving the government additional challenges and another which authorized the amendment of indictments have both been sustained as applicable to past transactions, as any similar law tending only to improve the remedy but working no injustice to the defendant, and depriving him of no substantial right doubtless would be."

Cooley's Constitutional Limitations* 272, 273.
***1 Bishop Crim. Law.* §§ 279, 280.**

This reasoning by analogy may be extended to the case in hand, and the court should consider, *that struck juries have been adopted as a part of the criminal and civil practice of New Jersey, and whether there were or were not struck juries at common law, that same are a constitutional form of jury within the meaning of the New Jersey Constitution*, and a struck jury, as it now exists and has existed in this State, is as fair and impartial a jury as the common law jury. If the struck jury as it now obtains in this state and the legislation therefore, is a mere change in procedure and not in spirit, and if it affords the defendant a fair and impartial jury and if its incidents are in all essen-

tials those of the jury at common law; then it is a jury under the meaning of the United States and the State constitutions.

Thompson v. State of Utah, (supra.)
Moschell v. State (supra.)
Fowler v. State (supra.)

Laws may be passed by the Legislature providing for the method by which jurors may be drawn, as through a board of jury commissioners.

People v. Harding, 53 Mich. 48, 53, 55.

The common law method committed to the sheriff, coroner, or elisors, the entire selection of the jurors. This has been supplanted in all of the states by statutes.

In general the provisions of the statutes in regard to the mode of obtaining jurors are directory and a substantial compliance with the requirements of the law is sufficient. The first step in the organization of the jury is the selection of the list of qualified persons. * * * It is wholly the creature of statute both in England and the United States, and did not exist at common law.

Am & Eng. Enc. Law "Jury and Jury Trial," Vol. 12, pp. 327, 328.

The statutes of New Jersey relating to struck juries above mentioned regulate only the manner by which the trial jury is brought together. Laws of this character are not violative of the federal constitution or statutes. They only regulate matters of procedure. No one of the essential elements of what is commonly understood as a legal jury, either at common law, or by statute, and as derived through the common law, has been taken away by the statutes of New Jersey in question.

Missouri v. Lewis, (supra) 31.
Hurtado v. California, (supra) 535.
Hallinger v. Davis, (supra) 321.
Duncan v. Missouri, 152 U. S. 382.
Hopt v. Utah, 110 U. S. 574, 590.

It is extremely doubtful whether there is any sheriff in the State of New Jersey that has a jury list made up of all the persons liable to jury duty as contemplated by the statutes of said State and from which the general panels are supposed to be made up. But the many laws on the statute books of this State show that the Legislature has regulated the method of drawing, providing the list of jurors and the impanelling of the jury by which the ordinary jury is formed from the general panel.

A statute enacting that the party accused if he should so elect might be tried by the Court, instead of by a jury is not unconstitutional and in conflict with the State constitution, that every person accused shall have a speedy and public trial by an impartial jury and that "the right of trial by jury shall remain inviolate."

State v. Worden, (supra) 369.
State v. Edwards, 16 Vroom (45 N. J. L.) 419.

The constitutional right of a trial by jury is not violated by a statute which provides for the determination by the Court of the degree of crime on a plea of guilty of murder.

State v. Almy, 61, N. H., 428 (22 L. R. A. 744.)
Hallinger v. Davis, 146 U. S. 314-318.

The right which is thus secured by constitutional guarantee must, in its nature be subject to legislative control, to an extent perhaps not easily definable in advance.

1 Bishop Criminal Procedure, Sec. 893.

Although at common law the right to be tried by jury in the case of felony could not be waived.

4 Black. Comm. Sharwood's Ed. 349.

It has been before seen that in England, although it was customary to return twenty-four jurors in criminal cases prior to 3 George II, nevertheless if a larger or smaller number were returned the English Courts on that account did not hold the proceedings invalid.

1 Chitty Crim. Law, 505.

All these changes have been held not to infringe the right of trial by jury. What is there in a struck jury in New Jersey which is so essentially different from the common law trial jury that it is forbidden by our Constitution? AS TO THE NUMBER OF JURORS, it has been seen to be unessential if twelve are sworn. As to the SELECTION OF THE NAMES at common law, it was the sheriff who made the selection. It is the judge of the Court in which the trial is to be had who makes the selection of names in New Jersey, for a struck jury, than which no fairer and more impartial selection could be made. AS TO THE CHALLENGES the reduction in the number of challenges allowed at common law, which was thirty-five, has been held not to be unconstitutional. And it may well be questioned whether it is not a greater privilege to strike off a larger proportional part of a limited number of names of men carefully selected for their probity and intelligence, so that by this process of elimination the best may be left, than to have a great number of challenges against a practically unlimited number of men selected at random.

The constitutional requirement means only that the defendant shall be secure in a trial by a jury of the country, of the proper number, twelve men, properly qualified and returned by the proper officer,

and selected from the body of the county; and that the truth of every accusation against a man, whether preferred in the shape of indictment, information, or appeal should afterwards be confirmed by the unanimous suffrage of twelve of his equals, indifferently chosen and superior to all suspicion.

4 Black. Comm. 350.

In Colt v. Eves, (1837) 12 Conn., 252, it was objected that the jurors in question were not taken from the body of the county, but from a particular section, and that the trial by jury was not preserved inviolate.

Williams, Ch. J. "To preserve the trial by jury inviolate cannot mean that we must pursue the exact course taken in order to collect jurors. If it does what time is to be selected, for they have been constantly altering the qualifications, the exemptions and the mode of summoning jurors, besides the common law required merely, that the jury should come from the vicinage. The statute of 4 and 5 Ann. requires, that the jury should be taken from the body of the county." * * *

"Were this, however, an innovation upon the common law, it would not follow that the trial by jury was not preserved inviolate. It never could have been intended to tie up the hands of the legislature so that no regulation of the trial by jury could be made."

In Beers v. Beers. 4 Conn., p. 539, Hosmer, Ch. J. "An instrument remains inviolate if it is not infringed, and by the violation of the trial by jury, I understand taking it away, prohibiting it, or subjecting it to unreasonable and burdensome regulations, which if they do not amount to a literal prohibition are at least, virtually of that character. It never could be the intention of the constitution to tie up the hands of the legislature so that no change of jurisdiction could be made, and no regulation even of the right of trial by jury, could be had. It is sufficient, and within the reasonable intendment of that instrument, if the trial by jury be not impaired, although it may be subjected to new

modes, and even rendered more expensive if the public interest demand such alteration." 65 N. W. Rep. 196

In *Lommen v. Minneapolis Gas Light Co., 33 Lawyers Report An. p. 437*, the court construed "An act to provide for struck juries," etc.—and held same not in conflict, with the constitutional provision that "the right of trial by jury shall remain inviolate."

A most exhaustive consideration of the law relating to struck juries is given in this case.

Among other statements the court say at page 441: "The question in the present case is, what is a trial by jury within the meaning of the constitution? The expression trial by jury is as old as Magna Charta, and has obtained a definite historical meaning which is well understood by all English speaking peoples; and for that reason no American Constitution has ever assumed to define it. We are therefore relegated to its history at common law to ascertain its meaning. The essential and substantive attributes and elements of jury trial are and always have been number, impartiality and unanimity. The jury must consist of twelve, they must be impartial and indifferent between the parties and their verdict must be unanimous. It cannot be claimed that the act under consideration affects either the first or third of these essential attributes of a jury trial. If it affects any of them, it must be the second, viz: impartiality. *No court ever held or intimated that, in order to preserve the right of trial by jury inviolate it is necessary to continue the particular method of selecting jurors in force at the time of the adoption of the constitution.* On the contrary, it has always been held that the method of selection is entirely within the control of the legislature, provided only that the fundamental requisite of impartiality is not violated."

At page 442, the court further say: "Special or struck juries were well known to the common law, their origin being so ancient that its date cannot be ascertained."

The objection that a defendant is deprived of per-

emptory challenges, is also considered at page 441—of this case—and the legislation in the different States is examined, and the court at page 443, in conclusion say:

"In view of such a consensus of opinion on the part of the legislatures, and impliedly of the courts and bar of the country, that statutes of this kind do not impair the common law right of trial by jury as known and understood in American constitutional law, we would not be warranted in holding this act unconstitutional."

In 1896 a law was passed in New York State (Chapter 378) providing for a special jury in criminal cases. In October 1898 a motion was made for a special jury under this law by the District-Attorney of New York County, to try one Frank Dunn charged with the crime of murder. The law provided for a special jury in criminal cases in each county of the state having a certain population, and for the mode of selecting and procuring such special juries through a special jury commissioner, and regulated and prescribed the duties of such commissioner. An appeal was taken from the order for a special jury and the case was decided January 10, 1899 by the New York Court of Appeals *157 N. Y. Reports (Court of Appeals E. H. Smith 11). 528.*

It was claimed the law was unconstitutional and that it was violative of the right of trial by jury. The New York constitution (Art. 1, Sec. 2) provides that "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever."

The court held the act not to be unconstitutional, and that the act did not work a deprivation of life, liberty or property "without due process of law," and that special juries were known to the common law from early times. The court reviews the system of trial by jury at page 533, and at page 535 says: "From this brief inquiry we would seem justified in saying that special as well as struck juries were resorted to at common law, and that the mode of the selec-

tion of jurors was a matter for legislation, and again at page 536, "whether we examine the question in the light of authority, or of reason; we find that the object aimed at under the common law, and which the constitutional provision must be deemed to have intended, is the obtaining of an impartial jury of twelve men and how that shall be accomplished is a matter within legislative regulation."

This last case cites the case of *Fowler v. State* (*supra*) and upholds the principles laid down in that case and the case of *Moschell v. State* (*supra*) and in the present case now under review.

IV.

CONCLUSION.

All the other objections raised by the plaintiff in error in his assignment or statement of errors, filed in this cause are general in form. Where they relate to alleged violations of the Constitution of the United States or amendments thereto, (exclusive of the fourteenth amendment,) they do not apply to this case in this Court, as such amendments as may be claimed are applicable, relate only to the Federal Government, and not to the States.

> ***Barron v. Baltimore, 7 Peters 243, 247.***
> ***McElvaine v. Brush, 142 U. S. 158.***
> ***Fourteenth Amendment to Constitution of U. S. Guthrie 3, 22, 58.***

The objections relating to errors in the procedure of the trial court in that the jury was impanelled when certain of the struck jury were not returned served by the sheriff, and others, whose names, together with the names of absent struck jurors were placed in the box and called when they did not appear, and the trial court not sustaining the challenge to the array, are of no force in this court, as such procedure was

in conformity to Section 76 (*supra*) of the statutes in question, and the uniform practice of the courts of New Jersey.

Smith v. Smith, 23 Vroom (52 N. J. L.) 207.
Patterson v. State, 19 Vroom, (48 N. J. L.) 381.

No application was made to postpone the case until two of the jurors had been called and sworn, and a postponement was then impracticable. During the calling of the jury some were excused by counsel and others were permitted to stand aside. After eleven jurors had been secured, the Court permitted the names of those permitted to stand aside to be again put in the box. This was in accordance with the practice. The twelfth juror was obtained from the jurors whose names were put back in the box. The jury who tried the case was thus obtained from the panel selected and certified by the Court.

The course pursued by the trial court was a matter of procedure. The questions related to the construction of the State laws and practice only, and the decision of the trial court, affirmed by the highest Appellate Court of New Jersey, in this case, even if erroneous, will prevail in this court. There is nothing in such errors raising a federal question under Section 709, U. S. Statutes, or the Fourteenth Amendment (*supra*), and this court follows the decisions of the State Court.

McElvaine v. Brush, 142 U. S. 155.
McNulty v. California, 149 U. S. 647.
Kohl v. Lehlbach, (supra) 299.
Lambert v. Barret, 157 U. S. 697, 699.
In re Converse, (supra) 631.

It is respectfully submitted that the judgment of the State Court should be affirmed.

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